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Re: Comments and, Alternatively, Request for Reconsideration and Public Notice and Comment Period, in response to General Application for Air Preconstruction Permit and Amendment, for Valero Refining-Texas, L.P. Air Quality Permit No. 2501A (submitted November 6, 2017; released in redacted form, in response to a public information request on December 20, 2018)

The undersigned groups: Texas Environmental Justice Advocacy Services, Caring for Pasadena Communities, Lone Star Legal Aid, Lone Star Chapter Sierra Club, Environmental Integrity Project, and Earthjustice hereby submit the below comments on TCEQ Project # 277656, which addresses Valero's application to amend Permit No. 2501A for its Houston refinery, based on the application it submitted November 6, 2017. Valero wishes to amend the permit to allow for what Valero calls an "FCCU/Alky Turnaround Project." Although Valero asserts this project involves only "turnaround maintenance activities," the project appears to be a significant one: Valero's application for the project indicates that the capital cost of the upgrade is greater than $25 million.[1]

Although Valero asserts that no public comment is required because the only permit-limit increase involved is a "de minimis" increase of 0.07 tons/year for VOCs, we are concerned about some potentially serious problems with Valero's application related to the applicability of major Prevention of Significant Deterioration ("PSD") requirements—problems that indicate that Valero may improperly be trying to avoid the requirement to conduct a "netting" test (as defined

[1] The application we have been provided does not indicate exactly how much the project will cost, but the application indicates that Valero is paying the maximum permit application fee, which is $75,000 and which applies to projects with capital costs greater than $25 million.

in 30 TAC § 116.12(13)) to determine if major PSD is triggered.[2] Because of these potentially serious problems, we ask that TCEQ consider the below comments and ensure that it remedies these issues. In the event that TCEQ has given final approval to TCEQ's proposed project already, we ask that TCEQ reconsider that request and submit the modification for public notice and comment, for the reasons provided in this comment letter.

The emissions that Valero claims will result from the proposed project—without taking into account any creditable decreases from other parts of the facility—are extremely close to the significance thresholds that would trigger major PSD applicability for sulfur dioxide (SO2) (40 tons/year), particulate matter with diameters 10 micrometers and smaller (PM10) (15 tons/year), particulate matter with diameters 2.5 micrometers and smaller (PM2.5) (10 tons/year), and sulfuric acid mist (7 tons/year): the application lists resulting annual emissions increases of 39.73 tons SO2, 14.5 tons PM10, 9.87 tons PM2.5, and 6.03 tons sulfuric acid mist.

As described below in more detail, Valero's application is flawed in several specific ways. First, Valero appears to have inflated the historic, baseline PM2.5 emissions that it used for the fluid catalytic cracking unit ("FCCU"), as its claimed baseline is significantly higher than the emissions it reported to TCEQ for those same years for emissions-inventory purposes. Second, Valero claims that a large portion of future PM2.5 emissions from the FCCU can be excluded for PSD-applicability purposes because the FCCU supposedly "could have accommodated" emissions during the baseline period. But this claim is faulty because Valero has not shown that these excluded emissions are unrelated to the now-proposed modifications to the FCCU. Third, Valero has not sufficiently explained how it calculated projected emissions resulting from the project—at least based on the redacted version of the application that TCEQ released in response to a Public Information Act request. Fourth, TCEQ should consider whether the upgrades at issue here should be aggregated with a previous upgrade that Valero undertook—also related to the refinery's alkylation units and involving boilers that are also impacted by the now-proposed project. Based on the information available to us, it appears that these two projects may be substantially related.

Even if TCEQ determines that the need to conduct the netting test is not triggered here, TCEQ—in keeping with 30 TAC § 116.127—should require more stringent monitoring of PM2.5 and PM10 from the FCCU, to ensure in the future the project does not in fact trigger the requirements of major PSD.

Before we discuss the substantive problems with Valero's application, we note that TCEQ's redaction of portions of the application has prevented us and other members of the public from fully evaluating potential problems with Valero's application. Although TCEQ

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[2] 30 TAC § 116.12(13) defines the "netting test" as follows: "The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required." Section 116.160(b)(1) provides that the netting test "is required for all modifications ..., unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 [CFR] §52.21(b)(23)."

eventually (after an opinion from the Texas Attorney General's office) released the "confidential" version of the application, that version was still heavily redacted—including redactions of information that appear critical to understanding how Valero's calculations were made. For example, in Table A-2 of the application, which details the calculations specifically for the FCCU, two entire rows are blacked out, including the heading for the rows. (Without the headings, we cannot even tell what categories of information were blacked out.) It appears that this redacted information is related to how the historic, baseline emissions were calculated. Similarly, in Table A-6, which details the calculations for the tail gas incinerators, TCEQ redacted footnote 3, which apparently discusses how the post-project emissions were calculated. To enable us to fully evaluate major PSD applicability for this project, TCEQ should share, and release for public notice, a version of the application with no redactions. At the very least, TCEQ should provide descriptions of the information that was redacted so that we can evaluate whether to pursue this information through any other available avenues. As it is, TCEQ's redactions have thwarted public participation regarding the upgrades at issue.

At minimum, TCEQ should require Valero to fill in the gaps—and remedy the problems—with its application that we have identified below. After Valero has done so, we ask that TCEQ make this information available to the public, provide meaningful and multilingual public notice, and open the application up for at least 30 days of public comment on these important issues.

## I. Valero Appears to Have Inflated the FCCU's Baseline PM2.5 Emissions.

As TCEQ knows, at step 1 of the analysis for major PSD applicability, to determine the emissions increases resulting from the project alone, one compares the historical, "baseline actual emissions" from the affected units with emissions projected to result from the project at those units ("projected actual emissions").[3] Here, Valero chose the period January 2015 through December 2016 as the baseline for its PM calculations, asserting average annual PM2.5 emissions from the FCCU of 50.4 tons during this period. However, in the emissions inventory questionnaires that we pulled from TCEQ's website for those two years, Valero reported that the FCCU emitted an average of 46.2 tons/year of PM2.5—34.1216 tons in 2015 (see attached 2015 Questionnaire at 133), and 58.3504 tons in 2016 (see attached 2016 Questionnaire at 135). The difference between the application's PM2.5 baseline for 2015-16 and the emissions reported for the emissions inventory for these two years is 4.2 tons/year. Thus, if the emissions-inventory emissions are accurate, that 4.2 tons/year difference alone would trigger the need for Valero to proceed to performing a netting test at step 2 of the major PSD applicability analysis for PM2.5. TCEQ has encouraged the public to use the emissions inventory to track increases that may trigger the netting test, stating that: "Applicant must file [an] annual emissions inventory (EI) report for the site that is publicly accessible. The EI report may be used by the public to determine if there are any significant emission changes at the site that may potentially trigger NA

[3] In lieu of projected actual emissions, Valero has used the FCCU's potential to emit in its calculations for CO and sulfuric acid mist. *See* Appl. Table A-2 at fn.3.

and/or PSD netting requirements."[4] Consistent with TCEQ's own recognition that these data may illustrate a netting issue, TCEQ must evaluate this issue for Valero's proposed modification and provide an explanation that shows how it is satisfying applicable clean air requirements, before deciding what additional action is needed regarding the permit application.

As relevant here, Texas' State Implementation Plan ("SIP"), at 30 TAC § 116.12(3)(B), provides that baseline actual emissions for an existing facility (other than a power plant) are the "average rate, in tons per year, at which the facility *actually emitted* the pollutant during any consecutive 24-month period ... within the ten-year period immediately preceding either ...actual construction of the project, or the date a complete permit application is received for a permit." 30 TAC § 116.12(3)(B) (emphasis added). And 30 TAC § 116.12(3)(D) provides that baseline emissions "shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount." Valero's contemporaneous emissions inventory numbers are presumably more reflective of what was "actually emitted" by the FCCU during the baseline years than the numbers that Valero has provided with an application that asserts that the netting test is not required for PSD. At the least, the difference between the application figure and emissions inventory numbers suggest that the baseline PM2.5 emissions are based on a period for which there is "inadequate information for determining annual emissions."

From the redacted application provided to us, we cannot determine how Valero calculated the baseline PM emissions. We presume that Valero may have used unspecified emission factors from a December 2008 stack test at the FCCU: footnote 3 to Table A-2 states that is how the future projected actual PM emissions were calculated. If Valero used emission factors from stack testing that is a decade old, those emission factors are not representative of what was actually emitted seven to eight years later, during the 2015-16 baseline period.

Ultimately, Valero should be required to use the higher PM2.5 baseline emissions that it reported to the emissions inventory. At the least, Valero should be required to explain how it calculated its baseline PM2.5 emissions—and why it did not use the lower baseline amount that it reported to the emissions inventory. Further, TCEQ should open up the permit application and any accompanying Valero explanation for public notice and comment.

## II. Valero Has Not Established That It Can Take Advantage of the "Could Have Accommodated" Exclusion for PM2.5 Emissions from the FCCU.

Valero asserts that, under 30 TAC § 116.12(32)(A), 5.54 tons/year of the 14 ton/year increase in FCCU PM2.5 emissions resulting from the project (40% of that increase) can be excluded because the FCCU supposedly "could have accommodated" these increased emissions during the baseline period. Valero, however, has not established that this 5.54 tons/year increase is unrelated to the FCCU upgrades it now seeks to permit—and thus has not established that it is entitled to take advantage of this exclusion (also known as the "demand growth" exclusion) from

[4] Notice of Proposed Permit and Executive Director's Response to Public Comment, Permit No. O3764 (May 10, 2017) at 20, http://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=740609862017130&doc_name=Ltr%203764%2Epdf&requesttimeout=5000.

§ 116.12(32)(A). If Valero had not claimed this exclusion, the PM2.5 emissions increase from the FCCU would have triggered the requirement to conduct the netting test for major PSD applicability.

30 TAC § 116.12(32)(A) provides that, when calculating any increase in emissions that result from a project, "that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and *that are also unrelated to the particular project*, including any increased utilization due to product demand growth may be excluded from the project emission increase." 30 TAC § 116.12(32)(A) (emphasis added).

In footnote 2 to Table A-2 of its application, Valero states: "The capable of accommodating emissions are ... determined by multiplying the ratio of the rate at which we could have produced and the actual production rate during the baseline period by the baseline emission rate." Using this approach, Valero multiplied the FCCU PM2.5 actual baseline emissions of 50.4 tons/year by a "could have been accommodated ratio" of 1.11 to arrive at "could have been accommodated [baseline] emissions" of 55.94 tons/year. To arrive at the project emission increase of PM2.5 from the FCCU of 8.46 tons/year, Valero then subtracted the "could have been accommodated" emissions of 55.94 tons/year from the projected actual PM2.5 emissions of 64.4 tons/year. Had Valero used the original baseline number of 50.4 tons/year instead of the "could have been accommodated" emissions in this last part of the calculations, the difference between the baseline emissions and projected emissions would have been 14 tons/year—above the trigger of 10 tons of PM2.5 to conduct a netting test for major PSD applicability.

Section 116.12(32)(A) makes clear that "could have accommodated" can only be excluded if they are "unrelated to the particular project"—the modification at issue. The U.S. Court of Appeals for the D.C. Circuit explained that the demand growth exclusion "establishes two criteria a source must meet before excluding emissions from its projection: '(1) [t]he unit could have achieved the necessary level of utilization during the consecutive 24–month period [the source] selected to establish the baseline actual emissions; and (2) the increase is not related to the physical or operational change(s) made to the unit.'" *New York v. EPA,* 413 F.3d 3, 33 (D.C. Cir. 2005) (citing 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002)). Likewise, TCEQ's guidance on major NSR applicability[5] stresses that emissions must be unrelated to the proposed project if they are to be excluded—and that permit applications should include sufficient details so that project-related emissions increases can be distinguished from unrelated emissions. *See* p. 26. For instance, in Example 20 from the guidance, the owner or operator of a cement kiln had "demonstrated that demand for cement is, and will likely continue to be, higher than experienced during any sustained period over the last ten years."

Here, Valero's application does not appear to include any such details or evidence to show that the "could have been accommodated" PM2.5 emissions are not related to (or a result

[5] TCEQ, *Air Permit Reviewer Reference Guide, Major New Source Review – Applicability Determination* ("TCEQ NSR Guidance") (Oct. 2018), https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/fnsr_app_determ.pdf.

of) the changes made to the FCCU. Instead, Valero simply assumes that all of the "could have been accommodated" emissions are unrelated to the modifications at the unit—and could not be the result of those modifications. Relatedly, Valero has not "verif[ied] that [it has] and will operate for 24 consecutive months without an extended shutdown." *See* TCEQ NSR Guidance at Example 20. EPA has made clear that, when a "project will cause a throughput increase ... the emissions resulting from the throughput increase at those units cannot be excluded."[6] Here too, Valero states that the modifications will result in increased utilization of the FCCU—but, without justification, claims that a portion of the emissions from that increased utilization should be excluded.

TCEQ should require Valero to offer proof that the claimed "could have been accommodated" emissions are unrelated to—and not the result of—the modifications at issue and should share that proof with the public for public input and comment. Absent this, TCEQ cannot satisfy its responsibility to meet applicable permitting requirements.

## III. Valero Has Not Sufficiently Explained How It Calculated Post-Project Emissions from the FCCU and Tail Gas Incinerators.

For SO2, PM10, PM2.5, and sulfuric acid mist from the FCCU and tail gas incinerators (which are the units that are responsible for the overwhelming majority of emissions increases associated with this project), Valero has not sufficiently explained how it calculated projected actual emissions (or, in the case of sulfuric acid mist, potential to emit)—at least based on the partially redacted application that TCEQ released. Valero should be required to explain how it calculated the projected actual emissions, and that information should be shared with the public so that we can evaluate, and comment on, the accuracy of Valero's calculations. Without this information, we cannot fully evaluate the PSD applicability issues associated with this project. And there is no available information or evidence demonstrating to the public that TCEQ has so evaluated or determined that these requirements are satisfied.

30 TAC § 116.12(31) requires Valero to conduct a thorough analysis and project the *maximum* rate of future emissions resulting from the project, defining projected actual emissions as follows: "The *maximum* annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator ... *shall consider all relevant information*, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's *highest projections of business activity*, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan." 30 TAC § 116.12(31) (emphasis added).

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[6] Letter from Genevieve Damico, EPA Region 5, to Raymond Pilapil, Illinois EPA (Aug. 27, 2015), https://www.epa.gov/sites/production/files/2017-05/documents/r5admsoy.pdf.

While the application's footnote 3 in Table A-2 provides a small amount of explanation for Valero's calculations of projected emissions of PM and SO2 from the FCCU, this explanation is insufficient because it does not identify the specific emission factors or historical data that was used. And the non-redacted portions of Table A-6 provide no explanation for the calculations of the post-project SO2 emissions from the tail gas incinerators.

TCEQ must evaluate this issue and ensure that the application meets applicable requirements.

## IV. TCEQ Should Consider Whether, for Purposes of Major PSD Applicability, This Project Should Be Aggregated with Valero's Earlier Installation of a New Alkylation Unit.

On May 13, 2016, TCEQ issued permit 124424 to authorize Valero to construct a new alkylation unit and associated equipment, including a new cooling tower, new piping fugitive components and new 366 mmBtu/hour boiler (Boiler No. 4 or 50BF04). Valero's October 2014 application for the project (updated June 2015) explains that the one alkylation unit that the plant had at that time produced alkylate product from $C_4$ olefins and that Valero wanted to begin processing $C_5$ olefins at the existing unit, as well as build a new alkylation unit to process $C_4$ and/or $C_5$ olefins. June 2015 Appl. at 1-1. In addition to the new equipment from that project, Permit 124424 also contained emissions limits for existing units at the plant, including existing boilers 1, 2, 3, 5, and 6 (more commonly referred to in the permit materials as boilers 81BF01, 50BF02, 50BF03, 81BF05, and 81BF06). Valero's application indicated that the project would result in increased steam demand from these existing boilers. *Id.* at 4-2–4-3.

Like the 2016 project, Valero's pending project at issue here will also involve modifications to part of the alkylation unit, replacing the Kellogg reactor and surrounding piping and platforms, and upgrading associated piping and relief valves. June 2015 Appl. at 6-3. These modifications are expected to result in a "marginal" increase in alkylate yield. *Id.* And the pending project will also affect the same boilers as were affected by the 2016 alkylation unit project. In addition, the process flow diagram included in Valero's 2017 application shows that both downstream alkylation units receive product from the FCCU.

Valero asserted that the PM2.5 emissions increase resulting from the 2016 alkylation project would be 9.32 tons/year and that the resulting PM10 increase would be 10.88 tons/year—and that new boiler No. 4 would be responsible for the majority of that increase, with projected PM2.5 and PM10 emissions of 8.96 tons/year. TCEQ's May 2, 2016 Construction Permit Source Analysis & Technical Review at 1; June 2015 Appl. at Tables 5-1 and 8-1. Although these PM increase numbers were at step 1 of the major PSD applicability analysis (and thus do not take into account any contemporaneous decreases of PM at other units), these non-net increase numbers—like those from the pending project—are very close to the thresholds (10 tons/year PM2.5 and 15 tons/year PM10) that would trigger the requirement to conduct a netting test for major PSD applicability for these pollutants. Here, if the PM2.5 and PM10 emissions increases resulting from the 2016 alkylation project were combined with those from the pending FCCU project at step 1, the resulting emissions increases would clearly be above the threshold levels that would trigger the need to conduct a netting test.

Under certain circumstances, multiple nominally-separate but related modifications should be grouped together and considered a single modification for the purpose of determining major PSD/NSR applicability. Thus, the emissions increases of the nominally-separate projects are "aggregated"—or combined—in step 1 of the NSR applicability analysis. When related changes are evaluated separately, this can allow sources to improperly circumvent major NSR applicability. EPA has explained the concept of aggregation as follows:

> In 1993, we issued a letter analyzing a series of minor permit applications for 3M Company's research and development facility in Maplewood, Minnesota. This letter has been widely cited for its discussion of objective factors that could support a conclusion that nominally-separate changes should be treated as one project. These factors include the filing of multiple minor source or minor modification permits for a single source within a short period of time, funding information indicating one project, other reporting on consumer demand and project levels, other statements from the business indicating one project, EPA's assessment of the economic realities of the project, as well as the relationship of the changes to the overall basic purpose of the plant. Subsequently, we have issued additional letters discussing aggregation at particular plants in certain circumstances. Collectively, these letters outline an approach where we would look at case-specific facts and the relationship between nominally separate changes to determine whether they were a single project to be assessed for an emission increase under Step 1 of the NSR applicability test.

75 Fed. Reg. 19,567, 19,570-71 (April 15, 2010). Recently, EPA purported to narrow the circumstances in which separate projects should be aggregated and considered one project for NSR purposes. *See* 83 Fed. Reg. 57,324 (Nov. 15, 2018). This new reading of the Clean Air Act's requirements calls for emissions from multiple projects to be aggregated when the projects are "substantially related." *Id.* at 57,326. EPA elaborated on what it means to be "substantially related":

> "The test of a substantial relationship centers around the interrelationship and interdependence of the activities, such that substantially related activities are likely to be jointly planned (*i.e.*, part of the same capital improvement project or engineering study), and occur close in time and at components that are functionally interconnected." 74 FR 2378. The 2009 NSR Aggregation Action added, "[t]o be 'substantially related,' there should be an apparent interconnection—either technically or economically—between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity. We note that these factors are not necessarily determinative of a substantial relationship, but are merely indicators that may suggest that two or more activities are likely to be substantially related and, therefore, candidates for aggregation." *Id.*

*Id.* at 57,327.

Though we believe that EPA's new reading is incorrect and that TCEQ should apply the established, older test for aggregation, based on our review of the information available to us, the 2016 alkylation project and the pending modifications to the FCCU and other equipment could well meet even EPA's new narrower test for aggregation. These projects appear to be "substantially related" in that they are close in time to each other and affect some of the same units—and units that are functionally interconnected—at the refinery. At minimum, TCEQ must evaluate whether they are so related, and if it determines they are not, explain why, to ensure that it is satisfying applicable permit requirements. In addition, TCEQ should consider whether there are other earlier modification projects (in addition to the 2016 alkylation project) that could also affect the same equipment—and thus perhaps also be considered as a single project for the purpose of major NSR/PSD applicability. Valero may not slice a modification into smaller projects in order to avoid the thresholds and protections for public health that they require, and TCEQ must ensure that it is satisfying its responsibility to avoid this problem by demonstrating that this is not happening here.

## V. TCEQ Should Require Stronger Monitoring of PM from the FCCU.

Even if TCEQ determines that the proposed project and the earlier alkylation upgrade do not trigger the netting test requirements, TCEQ should require monitoring of PM2.5 and PM10 from the FCCU sufficient to ensure that post-project emissions do not trigger major PSD or the need to conduct the netting test. The Texas SIP requires that, when a source is using projected actual emissions in lieu of potential to emit for PSD/NSR applicability purposes (as Valero is here for PM2.5 and PM10), the source is required to monitor the emissions "that could increase as a result of the project . . . and calculate and maintain a record of the annual emissions . . . , in tons per year, on a calendar year basis" for either five or 10 years. 30 TAC § 116.127(b).

Valero admits this requirement applies here. *See* Appl. Table A-2 at fn.3. Yet Permit 2501A and the refinery's Title V permit contain inadequate monitoring provisions for PM from the FCCU—provisions that cannot ensure that major PSD will not be triggered in the future by this project. To ensure compliance with its PM limits for the FCCU, Permit 2501A primarily relies on stack testing on a schedule "as required by the TCEQ Executive Director" (*i.e.*, with no set frequency, with one limited exception found in Special Condition 55.G). Special Condition 55. According to Special Condition 55.C of the permit, the "last acceptable stack test was conducted on December 19, 2008"—over a decade ago. Also possibly relevant to PM monitoring are Special Conditions 38 and 55.D-G, which respectively require monthly or annual inspections of control equipment and contain limitations on the FCCU's ability to operate at certain coke burn rates. The only monitoring requirements we saw in the current Title V permit relevant to the FCCU's opacity and PM limits from Permit 2501A were: (a) "Additional Monitoring Requirements" containing operating parameters for liquid supply pressure and pressure drop at the FCCU's wet scrubber (only required to be checked once per week); and (b) quarterly visible emissions observations per the requirements of 30 TAC § 111.111. Title V Permit at 6-8, 257-58.

These inadequate monitoring/testing provisions from Permit 2501A and the Title V permit cannot ensure that the post-project PM2.5 and PM10 emissions from the FCCU will not

trigger the need to conduct the netting test for major PSD applicability. TCEQ should thus supplement Permit 2501A's monitoring provisions to require PM monitoring up to this task—and should provide for public input on the strengthening of these provisions. Doing so is especially important given how close Valero's projected PM emissions from the project at issue here are to the threshold for conducting a netting test.

Furthermore, because of the significant environmental justice and health concerns for community members near this facility, TCEQ should require additional, real-time monitoring of all other pollutants for which Valero is seeking an emissions increase, or show that adequate monitoring is already required, to ensure that there are no spikes above the significance thresholds due to the proposed increases.

## VI. TCEQ Should Evaluate and Reduce the Cumulative and Environmental Justice Impacts of the Proposed Emissions Increases and Ensure That It Follows All Applicable Environmental, Public Participation, and Civil Rights Requirements.

As TCEQ is well aware, Valero operates, and would emit the air pollution it seeks to increase in this application, within local communities that are disproportionately people of color and low-income people. For example, the Center for Science and Democracy at the Union of Concerned Scientists, in partnership with t.e.j.a.s. has studied environmental justice concerns in the communities exposed to Valero's pollution.[7] The report found that 97% of the people living in the Harrisburg and Manchester neighborhoods are people of color, 90% percent of them are low income, and 37% live in poverty.[8] The report found that "[l]ong-term daily exposures to air pollution can lead to health effects that go unaddressed due to residents' limited financial and health care resources."[9] As UCS and t.e.j.a.s. further explained: "Researchers have measured air pollution in Manchester countless times and found excessive levels that pose multiple risks to the community, yet little action has been taken."[10] TCEQ should take action to ensure it protects public health and to ensure compliance with all applicable clean air requirements, instead of allowing more SO2, VOCs, PM10, PM2.5, and sulfuric acid into the communities near Valero, without requiring additional controls, monitoring, or even public notice and comment.

It is time for TCEQ to fulfill its responsibility to protect public health, including in the neighborhoods affected by Valero's pollution—which is harmful in its own right and also comes on top of the emissions from other sources of dangerous air emissions. Starting with this permit modification, Valero should stop allowing emission increases into this community without

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[7] Center for Science and Democracy at the Union of Concerned Scientists, *Double Jeopardy in Houston: Acute and Chronic Chemical Exposures Pose Disproportionate Risks for Marginalized Communities* (Oct. 2016) (attached), https://www.ucsusa.org/center-science-and-democracy/connecting-scientists-and-communities/double-jeopardy#.WsvmIojwZjU.

[8] *Id.* at 5–6.

[9] *Id.* at 6.

[10] UCS & t.e.j.a.s., Air Toxics and Health in the Houston Community of Manchester (2016), https://www.ucsusa.org/sites/default/files/attach/2016/06/ucs-manchester-air-toxics-and-health-factsheet-2016.pdf.

ensuring that they will not cause or contribute to public health problems, or worsen the already severe environmental injustice in these neighborhoods. TCEQ should perform a scientifically sound cumulative risks and impacts analysis, working with independent health scientists and in consultation with the undersigned groups and affected community members, and release this for public notice and comment.

TCEQ also must ensure that it follows all applicable civil rights requirements in this permit modification process and all other permit reviews that it is currently undertaking, including for Valero.[11] TCEQ has previously faced a serious complaint (No. 01R-00-R6) that it did not follow applicable requirements of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, in regard to a refinery's air permit modification for a hydrocracker unit affecting another community of color (Beaumont, TX), and EPA accepted that complaint for investigation. The investigation addressed the concern that TCEQ discriminated on the basis of race by allowing a refinery company "to use inappropriate decreases in its netting calculations for the modification, thereby avoiding a permit hearing, and thus disproportionately denying African Americans the opportunity to participate in the permit process; and ... issu[ing] a permit modification that resulted in disparate distribution of the adverse health impacts from increased air pollution emissions."[12] Recently, TCEQ entered into an agreement to attempt to avoid liability for civil rights violations and discrimination, and that agreement is attached. Notably, under that agreement (*see* Section III), EPA is now requiring, and TCEQ has agreed, to hold at least two accessible community meetings to discuss opportunities for public involvement, with advance notice, accessibility, consideration of multilingual information and translator assistance. It is unclear why, in view of that, TCEQ is not ensuring here at least the same level of public involvement for the Valero permit. It should do so to be consistent with that agreement.

The example here—where in another disproportionately minority community, TCEQ has not released for public notice, comment, and a public meeting or hearing, the modification proposed, and where TCEQ appears to be attempting to allow a refinery to evade public notice and comment for large increases in harmful emissions that the facility alleges fall just below the significance thresholds—raises serious concerns in its own right. These concerns are amplified further in light of TCEQ's past history and the agreement it entered into to attempt to resolve the Beaumont complaint and avoid further EPA investigation of that complaint.

As TCEQ is well aware (from its past decisions to translate past permit notices into Spanish, and after t.ej.a.s. and other community members showed the need for interpreters at public meetings held on Valero in Manchester), multilingual public notice and communication is essential for all TCEQ communications and public comment opportunities regarding Valero. Without effective multilingual translation of communication, many people in the affected communities are unable to have a meaningful chance to review much less offer any comments or input regarding TCEQ actions on this facility. Yet, thus far, it appears that TCEQ has not released any information on the pending permit modification in any language other than English, nor has it provided any public notice in any language on this modification.

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[11] *See, e.g.*, 42 U.S.C. § 2000d *et seq.*; https://www.epa.gov/ogc/epas-title-vi-policies-guidance-settlements-laws-and-regulations.

[12] Informal Resolution Agreement between the TCEQ and US EPA at 2 (May 2017) (attached).

Finally, TCEQ has still has not released for public notice the full permit application that Valero submitted, when, as discussed throughout this letter (see above), this information is essential for the public to be able to evaluate and address TCEQ's permitting evaluation and any proposed or final decision on this proposed modification. It is inconsistent with public participation requirements for clean air permits and principles of environmental justice for TCEQ to refuse to release this information for public review and public notice.

The Clean Air Act requires TCEQ to facilitate public participation and includes permit application disclosure requirements, and it is inconsistent with these requirements for TCEQ to make a decision based on information it refuses to disclose but that is necessary to inform public participation and review of a permit application.[13] TCEQ has not cited any Clean Air Act provision that could authorize it to keep permit application material secret and refuse to release this information for public notice. A permit application and accompanying material needed to evaluate it are information that the statute and applicable regulations give the public a right to review to be able to participate in the permitting process.

In this instance, we believe that TCEQ must disclose the permit application for public review and notice to satisfy applicable Clean Air Act requirements and to ensure it does not raise additional civil rights concerns with hiding information from community members who are disproportionately people of color. It is impossible for the public to evaluate the application Valero has submitted, and all requirements it must meet, without the information marked "confidential" that TCEQ has still redacted in the most recent application (attached). Without the ability to review the redacted data it is not possible to review whether or not applicable permitting thresholds are met and which requirements may apply, for example. Without the redacted data, such as the list of information types likely to be included in the redacted material,

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[13] *See, e.g.*, 42 U.S.C. § 7475(a) (requiring public hearing for certain air permits and amendments, demonstrating public review is a core part of the process); § 7661b(e) ("*A copy of each permit application*, compliance plan, . . . emissions or compliance monitoring report, certification, and each permit issued under this subchapter, *shall be available to the public.*") (emphasis added); *see also* 30 Tex. Admin. Code § 122.312 (requiring public announcement for minor permit revisions that includes "*copies of the complete permit application*; the draft permit; *all other relevant supporting materials* in the public files of the agency"; also requiring the executive director to "*make available for public inspection . . . the complete revision application*") (emphasis added); 30 Tex. Admin. Code § 122.320 (requiring public notice for "initial issuances, significant permit revisions, reopenings, and renewals" that includes disclosure of "*the complete permit application*, the draft permit; *all other relevant supporting materials* in the public files of the agency") (emphasis added); 30 Tex. Admin. Ch. 39 (requiring public notice for certain air quality permits and amendments; *see also, e.g.*, 30 Tex. Admin. Code § 39.405(g) (requiring the applicant to "make a copy of the [permit] application available for review and copying at a public place"); *see also* 40 C.F.R. § 2.301(g) (discussing "[d]isclosure of information relevant to a proceeding," and stating that relevant information should be released "notwithstanding the fact that the information otherwise might be entitled to confidential treatment"); *id.* § 2.301(a)(4) (defining "proceeding" as "any rulemaking, adjudication, or *licensing* conducted by EPA under the Act *or under regulations which implement the Act*") (emphasis added).

the public cannot tell whether Valero's emissions are likely to be what its application states. As the Office of Attorney General made clear, TCEQ and Valero can have no valid basis for redacting any emission data, as the Clean Air Act requires disclosure of such information to the public.[14] In sum, the public needs to be able to see the redacted information to fully evaluate the basis for Valero's request, and to submit thorough comments to TCEQ regarding the permit application.

Indeed, just a few months ago, the TCEQ appeared to be ready to issue Valero a permit amendment that would have allowed approximately ten times the amount of hydrogen cyanide that Valero purports to emit, based on a faulty, English-only notice – and – inaccurate emissions data, as TCEQ is well aware from the record of that permit proceeding. We have attached and incorporate the comments submitted there. It took significant community comments raised in multiple comment submissions with technical attachments, two public meetings, and follow-up action by TCEQ to begin to address its mistake on that permit, and the application for a contested case hearing is still pending. In view of this, we are particularly concerned about the lack of public notice and any opportunity to comment on this new permit application, and believe that TCEQ must consider these concerns and the issues raised in this letter, and do a better job to ensure that it fulfills all of its obligations in regard to the newly proposed project, to involve the public and to demonstrate how it will ensure that Valero must protect public health and safety if this project moves forward.

We call on TCEQ to demonstrate that it is fulfilling and will ensure that it satisfies environmental and civil rights laws, rather than attempting to evade these requirements in this permit modification. TCEQ must commit to not allow Valero to evade NSR/PSD requirements, and must instead ensure that it follows all applicable clean air requirements, including public notice and comment. As part of this process, TCEQ must release the full permit application, and all relevant information necessary to evaluate that application and the proposed modification, in light of applicable environmental and civil rights requirements.

## VII. TCEQ Should Provide Public Notice and a Meaningful Public Comment Period on this Project.

As discussed above, and for the additional reasons provided herein, TCEQ should provide multilingual public notice of the permit application and related record, and at least a 30-day public comment period on this project. Here, Valero's permit application states that whether public notice requirements of 30 Tex. Admin. Code Chapter 122 will be triggered is "to be determined." Permit App. at 3. The application also appears to contend that the emission increases the permit seeks will be "below the de minimis requirements for public notice." *Id.* at 54. It is unclear what provision Valero is attempting to rely on for its assertion that notice is not required, or how it could do so.

To the extent Valero is relying on 30 Tex. Admin. Code 39.402(a)(3)(B), we read that section to require notice and comment here. It provides that public notice requirements apply for

[14] OAG Letter to TCEQ (Nov. 30, 2018) (attached).

amendments to NSR permits when "total emissions increase from all facilities to be authorized under the amended permit exceeds public notice *de minimis* levels by being greater than any of the following levels: (i) 50 tpy of carbon monoxide (CO); (ii) ten tpy of sulfur dioxide ($SO_2$); (iii) 0.6 tons per year (tpy) of lead; or (iv) five tpy of nitrogen oxides ($NO_x$), volatile organic compounds (VOC), particulate matter (PM), or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen." 30 Tex. Admin. Code § 39.402(a)(3)(B) (Emphasis added.) Here, there are "total emissions increases" above the requisite levels from § 39.402(a)(3)(B) for both SO2 and PM: Valero asserts that the project will result in actual emissions increases of 39.73 tons SO2, 14.5 tons PM10, and 9.87 tons PM2.5. To the extent TCEQ asserts that the phrase "total emissions increase" only refers to increases in permit limits, please provide support such an assertion. We believe that such a reading is not in keeping with the plain meaning of "emissions increase"—and that notice and comment is required here.

To the extent TCEQ maintains that § 39.402(a)(3)(B) does not require public notice here, we implore TCEQ to require notice and comment regardless under § 39.402(a)(3)(D)(iv), which provides that notice and comment requirements apply to amendments to NSR permits when the executive director determines that "there is a reasonable likelihood of significant public interest in a proposed activity." Here, as shown by these comments and previous engagement by community groups and the public on other permit activities involving this refinery, there is "significant public interest" in the modifications to the FCCU and associated equipment.

For these additional reasons and consistent with Clean Air Act public participation and permit review requirements, we, therefore, request that TCEQ submit the permit modification application for public notice and comment, and ensure full disclosure of the application and all other information necessary for the public and affected community members to be able to evaluate that application and any TCEQ proposed decision on it, in view of all applicable requirements.

## CONCLUSION

For all of these reasons, we ask TCEQ not to approve the proposed permit application from Valero without first providing meaningful and multilingual public notice and at least a 30-day public comment period, and ensuring that this and any other future or pending modification satisfies all applicable requirements.

We also ask that, before taking any further action on this modification, TCEQ meet and talk with the affected community members to provide additional information regarding this application, the process, and its next steps regarding evaluation of this permit modification, as well as any other modifications it is currently considering or anticipating that would, like this one, increase air emissions into the local community. TCEQ has held such informational meetings for other permits, where there is public interest, and we believe it should do so here, in addition to putting this project out for public notice and comment.

Alternatively, in the event that TCEQ has already approved and issued this permit modification to Valero, we ask that TCEQ provide full information and related documents on the permit modification that it issued, to the undersigned groups; and also that TCEQ reconsider that decision and put this information out for public notice and comment before a final decision is made.

Thank you for your time and consideration of this matter. Please respond to this letter with the information requested and please contact the undersigned groups to arrange a meeting at your earliest convenience.

Sincerely,

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